Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Space Station Licensing Rules and Policies	)	IB Docket No. 02-34
	)	

To: The Commission

REPLY TO OPPOSITION

SES AMERICOM, Inc. ("SES AMERICOM"), by its attorneys and pursuant to Section 1.429(g) of the Commission's Rules, hereby submits this Reply to the Opposition of Intelsat LLC ("Intelsat") in the above captioned proceeding.[1] Intelsat opposes the Petition for Reconsideration filed by SES AMERICOM and other satellite operators and manufacturers that sought elimination of the performance bond requirements imposed by the Commission's *Order*[2] (the "Coalition Petition").[3] Intelsat's arguments in support of the bond are unpersuasive and are conclusively refuted by the weight of the evidence before the Commission here.

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[1] Opposition of Intelsat LLC, filed Nov. 6, 2003 ("Opposition").

[2] *See* Amendment of the Commission's Space Station Licensing Rules and Policies, IB Docket No. 02-34, *First Report and Order and Further Notice of Proposed Rulemaking*, FCC 03-102 (rel. May 19, 2003) ("*Order*").

[3] The Intelsat Opposition does not expressly refer to SES AMERICOM's separate Petition for Reconsideration (the "SES Petition") that sought elimination or modification of the performance bond and other changes in the rules adopted in the *Order*. However, there is a substantial overlap between the issues covered in the SES and Coalition Petitions. Furthermore, Intelsat's Reply Comments in this proceeding specifically mentioned the SES Petition and opposed the changes in the bond rules SES AMERICOM proposed. *See* Reply Comments of Intelsat LLC, filed October 27, 2003 ("Intelsat Reply") at 3. The instant filing responds to these arguments.

I. THE PERFORMANCE BOND SHOULD BE ELIMINATED

A. The Pleadings Demonstrate that the Bond Is Harmful and Unnecessary

The record before the Commission here is replete with evidence that the performance bond will harm satellite service providers and customers and is unnecessary to deter speculation. In its comments in support of the SES and Coalition Petitions, Space Imaging states that "the costs of obtaining and maintaining performance bonds would be substantial and burdensome, particularly for small entrepreneurial companies seeking to bring new satellite services to the market." Space Imaging Comments at 5. Northrop Grumman opposes the bond only with respect to applications filed prior to the release of the *Order*, but its complaints about the bond are common to all applications. Specifically, the company notes that adding bond costs to the other costs faced by applicants could inhibit system implementation.[4] Thus, the threat of a bond forfeiture will not simply put off prospective speculators. It will also cause established operators to think long and hard about whether a venture involving a new orbital location or new service simply carries too great a risk of loss under the Commission's regulatory framework.

Obtaining a performance bond will impose burdensome costs on all new satellite system licensees that will ultimately be borne by users, even if a licensee happens never to miss a milestone. Coalition Petition at 3. But the larger problem is that the bond – and the associated forfeiture risk – will unfairly penalize licensees for developments over which they have no control, such as changes in business climate, the inability to resolve international coordination issues, or technological developments that render a once promising business plan obsolete. Space Imaging Comments at 6-7; Coalition Petition at 11-14; SES Petition at 5-6. Significantly, because the prime orbital locations in developed bands have already been licensed, any proposal to which the

[4] Petition for Partial Reconsideration of Northrop Grumman Space Technology and Mission Systems Corporation ("Northrop Grumman Petition") at 6.

bond applies already will be inherently risky. The Commission's bond rules can tip the scales against attempting to develop new services and orbital locations given the huge penalties for failure.

Even worse, commenters agree that the Commission's action could set off a proliferation of copycat bond requirements around the globe. Space Imaging Comments at 8; Coalition Petition at 16-17. As a result, operators of international satellite systems may ultimately face multiple, inconsistent system deployment requirements with associated penalties for failure in each jurisdiction. The combined effect will be to further deter the development of new services.

These grave harms are not balanced by any corresponding benefit from the Commission's bond rules. The *Order* contains multiple mechanisms designed to deter speculation, and a bond requirement is unneeded in light of the combined effect of these tools.[5] Northrop Grumman observes that the financial environment facing the satellite industry has significantly decreased demand for satellite authorizations. In fact, Northrop Grumman states that:

> While improving market conditions may someday revive the interest of speculators in seeking satellite licenses, the current difficulties being experienced by the industry as a whole have left the potential for such conduct at an historical low point.[6]

Thus, the bond requirement is a deeply flawed attempt to solve a problem that may never exist. There is no justification for retaining the performance bond.

B. Intelsat's Arguments in Defense of the Bond Are Groundless

Intelsat stands alone in this proceeding in its support for the performance bond requirement and in its opposition to the Coalition and SES Petitions. Intelsat claims that the bond is needed to prevent speculation and will not materially add to the cost of satellite systems.

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[5] Space Imaging Comments at 8-10; Coalition Petition at 3, 7-8; SES Petition at 9-12.

[6] Northrop Grumman Petition at 8.

Intelsat's arguments, however, ignore business realities, and Intelsat substantially underestimates the costs and impact of a bond.

Intelsat asserts that the Commission's new first come, first served licensing policies will increase the likelihood of speculative satellite applications, and that the Commission's current six-figure application fees and the other preparation costs are too low to stand as a deterrent to speculation, given the potential returns. Opposition at 6. Intelsat's theories simply don't stand up to scrutiny. Intelsat assumes the existence not only of a speculator willing to risk hundreds of thousands of dollars, but also of a potential buyer willing to pay the speculator a profit for a bare license. The buyer would have to want to build exactly the kind of system proposed by the speculator, because any major change in the proposal would send it to the end of the processing line. And the buyer would have to be unwilling to simply wait the speculator out, and apply for its own license after the speculator fails to construct.

As Northrop Grumman has observed, the current economic climate for satellite systems makes it very unlikely that anyone could profitably speculate in satellite licenses. Northrop Grumman Petition at 8. Even if market conditions improve, however, the risk of speculation is unlikely to increase materially. Again, it is important to note that the new systems to which the bond applies will by definition be in less-developed areas or less-established bands. Thus, the ventures will be inherently risky to start with, and the likelihood of a speculator being able to profitably sell a bare license is very remote.

Intelsat also attempts to downplay the annual bond maintenance costs that licensees will incur, asserting that "current industry rates for such bonds are 1 to 2 percent per annum." Opposition at 7.[7] In reality, of course, there are no "current industry rates" for satellite

[7] Apparently, Intelsat has at least recognized that its earlier quote of 0.75 to 1.5 percent was too low. *See* Intelsat Comments at 5 (Sept. 26, 2003).

construction bonds required by the Order, as the surety industry has no experience in issuing the type of bonds required under the *Order*. SES AMERICOM, however, has discussed the Commission's bond requirements with insurers familiar with the satellite industry. Based on those discussions, SES AMERICOM believes that annual fees for the bond will be significantly higher than Intelsat's estimate, up to three or four percent of the bond's amount, even for licensees with good credit. *See* SES Petition at 7.

In previous filings, Intelsat has based its bond fee estimates on the rates used for construction bonds in other industries. Intelsat Comments at 4. Apart from the obvious differences in complexity and external factors between building a road and building a satellite, existing construction bonds provide a poor analogy in another respect. "Normal" construction bonds are merely a "backup" to a legally enforceable construction contract between a purchasing party and the builder (including a legal *obligation* to build). In contrast to a contract, a license merely grants a *privilege* to a licensee to construct facilities and provide service. Thus, the bond requirement here acts as surety to the Commission for a forfeiture based on a licensee's failure to exercise the privilege granted by its license.[8] As SES AMERICOM's initial inquiries have borne out, surety companies may well view this type of bond as involving a higher level of risk that justifies higher maintenance fees and/or collateral requirements, if they agree to issue such a bond at all.

Given the base amount of the bond, the difference between the rate assumed – without foundation – by Intelsat and the rate estimate provided by SES's surety industry contacts,

[8] The proper classification of the instant bond requirement, and the Commission's statutory authority to impose it, are issues discussed in detail in the Reply to Opposition being filed concurrently by the Coalition. SES AMERICOM, which is a member of the Coalition, will not repeat those arguments here. We fully agree that the Commission does not have authority to penalize a party for failure to make use of a license; it only has authority to revoke the license for failure to exercise the privilege granted – and only on appropriate notice and for cause.

translates into hundreds of thousands of dollars over the life of the bond. A multi-satellite GSO licensee could face millions of dollars in fees over the course of constructing and launching its system. These costs – which contribute nothing toward the delivery of a useful satellite service and which must be paid even if an operator never suffers a forfeiture – will have to be recovered in the charges levied on satellite customers.

Furthermore, surety companies may refuse to issue bonds at all absent full collateralization of the bond amount. SES AMERICOM was recently advised by its broker that of seven surety companies the broker approached, only one was willing to offer a performance bond without 100% collateralization. This suggests that more thinly-capitalized companies will find it impossible to obtain a performance bond on reasonable terms.

Intelsat also asserts that a $5 million-per-satellite bond amount will not unduly burden legitimate licensees. Opposition at 7. Intelsat's assertion is entirely unsupported. It is simply illogical to assume that a $5 million bond would deter *only* frivolous applicants. Clearly, some legitimate proposals will never get past the drawing board under the Commission's rules because the potential for a bond forfeiture makes the overall venture too risky. This is particularly the case because so many of the factors that determine whether a promising proposal becomes a reality are beyond the control of the licensee. *See* Coalition Petition at 11-12. The unpredictability of these external forces means, as Space Imaging notes, that even experienced satellite operators – not just speculators – sometimes must abandon licenses. *See* Space Imaging Comments at 7 (citing C-, Ku- and Ka-band licenses that were abandoned due to changed market conditions).

Intelsat suggests that a $5 million performance bond represents only a small percentage of the overall costs of constructing and launching a satellite system. Opposition at 7. That may be true, but it misses the point. A $5 million forfeiture is a huge penalty in the context of a satellite program that must be terminated because of a the loss of a key prospective customer, the

failure to reach acceptable terms in an international coordination, or a technological change that affects the business plan's viability. It is the latter problem that makes the performance bond a deterrent to innovation and entrepreneurial risk-taking to develop new satellite projects.

Intelsat also opines that $5 million is insignificant compared to the $1 billion-plus prices recently paid to acquire assets and on-going businesses of satellite licensees. Opposition at 7. However, these transactions involved satellites in established bands located in prime U.S. orbital locations. Such prime slots are no longer available, and new satellite systems outside the U.S. arc or in undeveloped bands are unlikely to be valued at anywhere near these amounts.

Intelsat has previously suggested that the bond will just encourage applicants to raise the money they need for their systems "prior to or simultaneously with" obtaining a license. Intelsat Comments at 3. This simplistic approach ignores business realities. As SES AMERICOM explained in its submission, prospective customers of a satellite program typically will not commit before an operator has a license in hand. SES Petition at 13-14. Even then, additional negotiation is often required to finalize an agreement, and the licensee will also need to work with prospective manufacturers on the spacecraft design. Thus, a licensee – especially a licensee seeking to develop new services or expand to new areas – cannot be confident that it has a successful business plan until well after the license is granted.

Contrary to Intelsat's assertions, the performance bond will create obstacles to legitimate development of new orbital positions and innovative services and will impose significant unnecessary costs on all satellite operators.

II. IF KEPT, THE BOND REQUIREMENT MUST AT LEAST BE MODIFIED TO REDUCE ITS NEGATIVE IMPACT ON LEGITIMATE LICENSEES

Both the SES and Coalition Petitions request that the Commission eliminate the bond requirement altogether, given the chilling impact it will have on legitimate satellite licensees.

Should the Commission decline to take this action, however, the SES Petition proposes an alternative bond requirement that would help to minimize the harmful effects of the bond on satellite operators and users.

A. A "Ramp-Up" of the Bond Obligations Accommodates Business Realities

Although Intelsat claims that the progressive reduction in the bond amount (as the licensee gets closer to launch) is a "safeguard" added to protect legitimate applicants from the risks associated with the bond requirement, Opposition at 8, the *timing* of the current bond obligations in fact represents the single most detrimental aspect of the requirement. The current rule ironically threatens the most severe penalty in the early stages of a satellite project – when major customers are still being signed up and viability is the most uncertain. It also perversely imposes the greatest penalty exposure on those who hold licenses for the least amount of time.

SES AMERICOM proposes a "ramp-up" bond-posting schedule that is more in tune with the market realities of the satellite business. Under the proposal, an initial $500,000 bond will be due 90 days after license grant, rather than hitting the licensee with a $5 million bond obligation within the first 30 days. The remaining amounts are the same as under the current rules, but are imposed in the opposite order, thereby better conforming the size of the potential penalty to the length of the time the spectrum is unavailable for other users. This schedule provides legitimate applicants with the up-front time they need to develop innovative service offerings without the specter of a tremendous financial penalty should insurmountable problems arise in the crucial early stage. At the same time, a pure speculator would certainly think twice before "investing" a half-million dollars, plus application and processing costs, in non-prime frequencies/orbital slots with the hope of finding a buyer that just happened to have a compatible business plan.

B. Other Bond Reforms Should Be Implemented

Other bond reforms are needed as well. First, to ease the burden on licensees implementing a multi-satellite system, the Commission should permit the posting of a single, consolidated bond covering all satellites. Under the SES AMERICOM proposal, the consolidated bond amount would be capped at the maximum single bond level. SES Petition at 18-21. Such a consolidated bond would retain the deterrent effect of the bond requirement while improving the administrative and financial efficiency of the process.

SES AMERICOM also joins the Satellite Industry Association ("SIA") in asking the Commission to clarify that the bond requirement will not apply to replacement satellites where the applicant obtains authority to add new extended band frequencies or additional spectrum within the same band. SES Petition at 21-23; SIA Petition at 19-20. As Space Imaging explained, applying for a replacement satellite that incorporates additional spectrum "does not suggest any speculative motive whatsoever; rather, it reflects a legitimate need for additional spectrum resources to improve services to meet consumer demands." Space Imaging Comments at 11.

Finally, SES AMERICOM proposes that non-U.S. operators be exempt from any bond requirement, in order to avoid triggering a proliferation of similar reciprocal requirements that could be placed on U.S. operators by administrations around the world. SES Petition at 23-25; SIA Petition at 20-25. In total, SES AMERICOM believes that its bond reform proposals offer a more balanced approach between *dis*couraging speculation and *en*couraging innovation.

III. SES AMERICOM AND THE INDUSTRY AGREE ON THE NEED FOR CHANGES TO OTHER PROVISIONS IN THE ORDER

No party has opposed the other proposals contained in SES AMERICOM's Petition. Indeed, there is broad industry consensus on these issues, which are briefly reviewed below:

CDR Milestone Extension. Based on its own past satellite construction experience, SES AMERICOM believes that the one year between the contract execution and critical design review ("CDR") milestones is inadequate. SES and SIA proposed that the CDR milestone should be pushed back by six months (to 30 months after license grant). SES Petition at 25-28; SIA Petition at 12-16.

Confidential Treatment of Contract Information. SES AMERICOM joins with SIA in urging the Commission to return to a case-by-case approach to requests for confidential treatment of contracts. SES Petition at 29-32; SIA Petition at 36-32.

Milestone Extension Requests. SES AMERICOM urges the Commission to preserve its flexibility to grant milestone extensions for public interest reasons, and to revise Section 25.161(a) to conform to Section 25.117(e). SES Petition at 32-33; SIA Petition at 16-18.

CONCLUSION

For the reasons set forth herein, SES AMERICOM requests that the Commission reconsider the rules and policies adopted in the *Order*. Revision of the Commission's framework as SES AMERICOM has recommended will serve the public interest by removing unnecessary barriers to innovation, enhancing competition, and promoting efficient use of satellite spectrum.

Respectfully submitted,

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November 19, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 2003, a copy of the foregoing Reply to Opposition was served on the party listed below via electronic mail:

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